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IN THE

Supreme Court of the United States

October Term, 1978

No. 79-272

ROBERT A. BROWN, THOMPSON H. LANG,
ALBUQUERQUE PUBLISHING COMPANY (N.S.L.)
JOURNAL PUBLISHING COMPANY, a corporation,
JERRY CRAWFORD and WILLIAM C. HUME,
Petitioners,

-vs-

HONORABLE RICHARD B. TRAUB, DISTRICT JUDGE,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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OCTOBER TERM, 1978

NO. 79-272

ROBERT A. BROWN, THOMPSON H. LANG,
ALBUQUERQUE PUBLISHING COMPANY (N.S.L.)
JOURNAL PUBLISHING COMPANY, a corporation,
JERRY CRAWFORD and WILLIAM C. HUME,
Petitioners,

-vs-

HONORABLE RICHARD B. TRAUB, DISTRICT JUDGE,
Respondent.

The underlying action was instituted for libel in the District Court in and for the County of Bernalillo, New Mexico. Petitioners seek a Writ of Certiorari to the New Mexico Supreme Court to review its mandate of May 2, 1979, denying Petitioners' application for a Writ of Prohibition to the Respondent, a New Mexico District Court judge. Plaintiff, William C. Marchiondo, invoking state discovery procedures, propounded written interrogatories to Petitioners Hume and Brown, seeking to discover the factual basis, if any, for allegedly libelous newspaper articles. The Respondent, after having accorded both parties the opportunity to brief and argue the issues, directed the interrogatories be answered. Jurisdiction has been invoked under to 28 U.S.C. Section 1257(3), which provides:

Final judgments or decrees rendered by the highest court of a state in which a decision would be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, . . . where any title, right or privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held as authority exercised under, the United States.

STATEMENT OF THE CASE

There exists no actual controversy on the facts before the Court upon which to premise jurisdiction. Petitioner Hume asserts Certiorari should issue because Respondent directed the production of documents which presumably result in the disclosure of confidential news sources. Mr. Hume argues the Respondent's Order violates First Amendment immunities that inure to the benefit of newsmen in civil libel cases. (Petition, pg. 6; Appendix D, and E, thereto). The pertinent provision of the challenged Order states:

> Defendant Hume shall be required to produce such documents or other requested items as shall be in his possession or under his control. (Appendix C).

As shown by Mr. Hume's deposition (R. pp. 15,16), Mr. Eric Lanphere, counsel for Petitioners here and below, stated:

> With regard to documents, sought by the Subpoena Duces Tecum, it is our position today that all documents sought by the Subpoena are in the custody and control of Mr. T. H. Lang, and are not in the custody or control of the witness, Mr. Hume.

Petitioner Hume testified, (R. pg 159):

> Q. Is it your testimony you brought absolutely nothing, none of the requested items in this subpoena?
>
> A. I brought nothing with me to this deposition.

Mr. Hume has not produced any of the items requested in the Subpoena because he has no custody of the materials. There has been no injury to Hume.

Petitioner Hume next asserts certiorari should issue because Respondent's Order directed answers to Plaintiff's interrogatories numbered 21(b) and 21(c), (Appendix C to the Petition). By filing Supplemental Answers to Interrogatories on July 13, 1979, Mr. Hume complied with the Order. (R. pg. 1).

Petitioner Brown asserts certiorari should issue, because the Respondent directed him to answer Plaintiff's interrogatories numbered 31(d); 32(b); 33(b); 33(c); 35; 53(q); 54; 61(b) and 61(c), (Appendix C, Petition). By Supplemental Answers to Interrogatories filed on July 13, 1979, Mr. Brown complied with the Order, (R. pg. 4).

Petitioners represent at pp. 10, 11 and 14 of the Petition that they confront the spectre of a default judgment for ruinous damages and the onus of criminal contempt. Neither default judgment nor contempt proceedings have been initiated because the Respondent's Orders have been complied with. There is no pending controversy for resolution by this Court.

The New Mexico Rules of Appellate Procedure, Rules 3(c) and 4(d) set forth provisions for interlocutory appeals to the State Supreme Court. Rule 5, N.M. R. Civ. App. sets forth a procedure for a stay of enforcement of the Order or decree appealed from pending disposition by interlocutory appeal. Petitioners failed to invoke those procedures.

ARGUMENT

Point I. *THE JUDGMENT LACKS FINALITY*

For certiorari to issue for review of a state court judgment under 28 U.S.C. Section 1257(3), the judgment must be "final". In *North Dakota Pharmacy Bd. vs. Snyder's Stores*, 414 U.S. 156, 38 L.Ed.2d 379, 94 S.Ct. 407, (1973), Mr. Justice Douglas quoted Mr. Justice Frankfurter in explaining the ends served by the finality requirement of 28 U.S.C. Section 1257:

The finality requirement of 28 U.S.C. 1257 which limits our review of state court judgments, serves several ends:
(1) it avoids piecemeal review by federal courts of state court decisions;
(2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Article III;
(3) it limits federal review of state court determinations of federal constitutional issues to have at a minimum federal intrusions in state affairs.

Mr. Justice Frankfurter . . . summarized the requirement by Congress that in appeals from federal district courts as well as in review of state court decisions the judgments be 'final': '. . . only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State Court. . . .

The judgment from which review is sought is not "final" because it is devoid of any concrete controversy. Petitioners have submitted to the subpoena and answered the interrogatories. They have waived a full state review by appeal and did not seek a stay either in state court or here, under Rule 27 of the Rules of the Supreme Court, before the answers were made. Petitioners are not confronted with contempt proceedings. Compare, *Garland vs. Torre*, 259 F.2d 545, (2d Cir. 1958), *cert. denied*, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d. 231, (1959). Neither are Petitioners confronted with a potential default judgment for a failure to comply. Compare, *Sierra Life Insurance vs. Magic Valley Newspapers*, 4 Med.L.Rptr, 1689, (Idaho District Court 1978), cited by Petitioners at pg. 11, of the petition. Petitioners have chosen not to "enter the Straits of Messina" as they put it, by complying

with Respondent's Orders. In New Mexico, as in other jurisdictions, the extraordinary Writ of Prohibition is limited to instances in which there is no adequate remedy by appeal or where there exists a threat of immediate and irreparable injury. See *State ex rel. Serna v. Hodges*, 89 N.M. 351, 552 P.2d 787 (1976). Under the principles of substantive New Mexico law, such writs are not curative in nature, nor are they a substitute for appeal. *State ex. rel. Alfred vs. Anderson*, 87 N.M. 106, 529 P.2d 1227, (1974). By not appealing in the state forum, and electing compliance, Petitioners have eliminated any actual "case" or "controversy" between the parties, within the meaning of the final judgment rule of 28 U.S.C. 1257. In *Aetna Life Insurance Co. vs. Haworth*, 300 U.S. 227, 81 L.Ed. 617, 57 S.Ct. 461, (1937), Chief Justice Hughes explained:

> . . . A justifiable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . .

If certiorari issues, this Court's decision will be advisory since the asserted legal issues do not exist. If the state court is reversed, what is the relief? That Plaintiff return Petitioners their supplemental answers to interrogatories? By not appealing in the State system, Petitioners themselves have foreclosed their only legitimate and effective remedy.

Petitioners suggest at page 12, that an appeal in the state system would have been futile in view of the New Mexico Court of Appeals decision in *Ammerman vs. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1257, (Ct. App. 1977), *cert. den.*, 91 N.M. 249, 572 P.2d 1257, *cert. den.* 436 U.S. 906, 56 L.Ed.2d 404, 98 S.Ct. 2237, (1978), in which the intermediate New Mexico Appeals Court held that the First

Amendment to the United States Constitution did not grant a broadcaster a qualified or absolute privilege to refuse disclosure of confidential information, admittedly relevant to a civil defamation action. That an appeal would have been futile is a hypothication, of the type this Court in *United Public Workers v. Mitchell*, 330 U.S. 75, 91 L.Ed.2d. 754, 67 S.Ct. 556, (1954) stated, is simply "not enough".

POINT II. *THE STATE JUDGMENT BELOW TURNS ON A QUESTION OF FACT CORRECTLY DETERMINED BY A STATE COURT, NOT ON A CONTROLLING QUESTION OF FEDERAL LAW.*

It is established that the Court will not review a state order, where it turns on a question of fact and not on a controlling question of federal law, *Mammouth Mining Co. v. Grand Cent. Mining Co.*, 213 U.S. 72, 53 L.Ed 702 129 S.Ct. 413, (1909). That principle has direct application to the Petition.

Petitioners assert a constitutionally mandated evidentiary "balancing test", or qualified privilege similar to that applied in *Mize v. McGraw Hill*, 82 FRD 475, (S.D. Tex. 1979); C.f. *Adams v. Associated Press*, 46 FRD 439, (S.D. Tex. 1969). *Mize, supra*, was an action brought in federal district court upon diversity jurisdiction for libel. Plaintiff propounded interrogatories seeking disclosure of information provided Defendants. Two years after the interrogatories were propounded, Mize moved to compel answers. The Court denied the motion, because of the Plaintiff's lack of diligence and the absence of showing of alternate efforts to obtain the information in deference to a judicial policy grounded upon general First Amendment considerations.

Assuming, without conceding, that the exercise of a state trial judge's discretion to control and direct discovery in a libel case is controlled by constitutional considerations, Petitioners concede at

pp. 27 that there is no record in the instant actions to indicate whether such a "balancing test" was performed. It is just as likely as not that Respondent did weigh or "balance" the need of the plaintiff to discover the information sought with due consideration to the nature of his claim and the posture of the case as opposed to any hardship that would attach to Petitioners. The record upon which review is sought is devoid of any facts showing or tending to show Respondent failed or refused to consider the relevancy of the information sought or its accessability from alternate sources.

POINT III. *CONTRARY TO THE ASSERTION OF PETITIONERS, THE DECISIONS OF THE COURTS ARE CONSISTENT AND THERE IS NO DIVERSITY OF OPINION ON THE ISSUE.*

Petitioners assert that Plaintiff Marchiondo is a "public figure". That issue is yet unresolved. If the plaintiff is a "public figure", he must prove the publications were made with "actual malice", *viz.* by proof of the knowing publication of untruth, or with reckless disregard, *New York Times vs. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, (1964). If plaintiff is not a "public figure," it is constitutionally incumbent to prove fault or negligence as a predicate to the award of damages. See, *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, 347, 41 L.Ed.2d 789, 94 S.Ct. 2997, (1974) and *Herbert v. Lando*, _____ U.S. _____ 60 L.Ed.2d 115 at 123, 99 S.Ct. 1635, (1979). This court has expressly recognized that evidence showing, or tending to show, publication without a factual basis, or upon information obtained from sources of questionable credibility, is evidence central to a libel plaintiff's burden of proofs, regardless of the test. See, *Lando, Gertz* and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975, (1967).

Petitioners assert that the decisions of the courts are hopelessly split on the issue of the asserted First Amendment immunity to a plaintiff's discovery in libel action. The cases reveal the opposite. Were this Court to grant certiorari and elevate to a constitutional plane the asserted evidentiary privilege, the cases would be thrust into diversity.

Initially, the Court's decisions in *Branzburg v. Hayes, In Re Pappas and U.S. vs. Caldwell*, 408 U.S. 665, 33 L.Ed.2d, 92 S.Ct. 2646, (1972); *Zucker v. The Stanford Daily, et al.*, 436 U.S. 547, 99 S.Ct. 232, 56 L.Ed.2d 525, (1978) and *Herbert vs. Lando, supra*, have declined to elevate to a constitutional status, asserted First Amendment privileges against disclosure by newsmen. Petitioners seek to distinguish that application of those cases since for the most part, they addressed disclosure in criminal as opposed to civil litigation.

The cases directing disclosure of a newsman's sources in defamation cases are long standing, and consistent with settled constitutional doctrine. *Garland v. Torre*, 259 F.2d 545, (2nd Cir. 1958), *cert. den.* 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed. 231, (1958) is one of the first to address the issue. Judy Garland instituted a defamation action for a C.B.S. Radio program written by Mrs. Torre. Mrs. Torre attributed the defamatory remarks to a C.B.S. executive whom she refused to identify in discovery. The trial court declined to hold that disclosure was foreclosed by virtue of a First Amendment privilege and directed discovery because the information "went to the heart of plaintiff's claim". When defendant refused, she was held in contempt. On appeal from the contempt citation, then Circuit Judge Stewart, upheld the trial court:

> If an additional First Amendment liberty—the freedom of the press—is hereby involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.
> 259 F.2d 545 at 549.

Carey vs. Hume, 492 F.2d 631, (D.C. Cir. 1974) *cert. den.* 417 U.S. 938, (1974), cited by Petitioners, is additional illustration of the consistency of the decisions. *Carey, supra*, was a defamation action. The U.S. District Court directed newsmen who were parties to the action to reveal the names of alleged confidential sources. In sustaining the order to disclose, the Court stated:

> We reject the only contention made to us by the appellant, and that is, or there should be, an absolute First Amendment barrier to appellant's disclosure by a newsman of his confidential sources under any circumstances. This was not, in our view, the law before *Branzburg*, and it is certainly not the law after . . . 492 F.2d 631 at 634.

In those cases in which disclosure of newsman's sources has been refused, the factual patterns were materially different. In personal injury and products liability cases, in which neither the newsman, nor his newspaper, were parties, the Courts (although not uniformly) have generally ruled against disclosure. *Apicella vs. McNiel Laboratories, Inc.*, 66 FRD 78, (1975) is illustrative. There plaintiff sought recovery for permanent injuries allegedly sustained as the result of defendant's improper drug manufacture. Plaintiff deposed the editor of a medical journal in which an article critical of defendant's drug appeared, and sought the disclosure of the identity of the physicians who contributed to the article. In refusing to direct disclosure the Court stated:

> In a libel case, unlike other civil actions, the reporter or publisher is a party to the suit. Moreover, the identity of the source may be crucial. . . . No absolute rule of privilege protects newsmen. Nevertheless the *policy* protecting news reporters' sources is sufficiently close to a privilege to warrant exclusion from discovery in every instance. (Emphasis added), 46 FRD 78 at 81 and 83.

Baker vs. F & F Investment, Inc., 470 F.2d 778, (2d Cir.

1972) *cert. den.* 411 U.S. 966 (1973), cited by Petitioners, is likewise illustrative of the lack of diversity of opinions addressing the issue. There, plaintiffs sought relief under the Civil Rights Act for discrimination in the sale of housing. Plaintiffs sought to compel the disclosure of the sources of information utilized by non-party newsmen in an article published ten years earlier in the Saturday Evening Post about blockbusting. The Court, in refusing to direct disclosure, stated:

> Although it is safe to conclude, particularly after the Supreme Court's decision in *Branzburg* . . . that federal law does not recognize an absolute or conditional journalist's testimonial privilege, neither does federal law require disclosure by confidential sources in each and every case, both civil and criminal in which the issue is raised. 470 F.2d 778 at 781.

See also, *Silkwood vs. Kerr-McGee*, 536 F.2d 433, (10th Cir. 1977) (disclosure from non-party newsman in wrongful death action denied); *Loadholtz vs. Fields*, 389 F.Supp. 1229. (M.D. Fla. 1975) (disclosure from non-party newsman denied in civil rights lawsuit); *Gilbert vs. Allied Chemical Corporation*, 411 F.Supp. 505, (E.D.Va. 1976) (disclosure request of non-party newsmen in personal injury action denied). In accord, see *U.S. vs. Liddy*, 354 F.Supp. 208, (D.C. 1972) *Farr vs. Pritchess*, 552 F.2d 464, (9th Cir. 1975); *Anderson vs. Nixon*, 444 F.Supp. 1195 (D.C. 1974), and *In Re Grand Jury Empaneled January 21, 1975*, 841 F.2d 373, (3rd Cir. 1976).

What the cases hold, consistently, is that disclosure by newsmen of sources is dependent upon the circumstances of the case. In a libel action, disclosure is appropriate. In other types of actions where the need for disclosures is tangential to the issue, in deference to a judicial policy protective of the press disclosure will generally not be compelled.

The state cases that have resolved the issue in both result and analysis are consistent with the federal decisions. Disclo-

sure is directed where the sources pertain to the factual basis upon which defamatory publications are based. See, e.g., *Caldero v. Tribune Publishing Co.*, 98 Id. 288, 562, P.2d 791, *cert. den.* 98 S.Ct. 418, (1977), *State vs. Buchanon*, 250 Or. 244, 436 P.2d 229, (1978); *In Re Goodfather's Appeal*, 45 Haw. 317, 367 P.2d 472, (1961); *Dow Jones vs. Superior Court*, 364 Mass. 317, 303 N.E.2d 847, (1973), *Farr vs. Superior Court*, 22 Cal. App. 3rd. 60, 99 Cal. Rptr 342, (1971), and *Ammerman vs. Hubbard Broadcasting Co.*, 91 N.M. 250, 572, P.2d 1257, (1977). *cert. den.*, 436 U.S. 906.

Petitioner's reliance upon *Time vs. Cervantes*, 464 F.2d 986, (8th Cir. 1972), *cert. den.* 409 U.S. 1125, (1973), to establish a diversity of opinion is misplaced. The dispositive issue in *Times, supra*, was the propriety of summary judgment granted in favor of Time Magazine, prior to the completion of the plaintiff's discovery.

CONCLUSION

The proper function of certiorari and review by this court is to settle important federal issues, not to settle factual issues. The state trial court fairly decided the propriety of disclosure. The record is devoid of any reference indicating that the Respondent did not fairly consider the propriety of disclosure, as opposed to sustaining Petitioner's objections to interrogatories. Likewise, there is no "controversy" or "case" upon which to impart the finality predicate to invoking the Court's jurisdiction under 28 U.S.C. 1257(3).

It does not help the Petitioner to observe that whether newsmen in defamation cases have a qualified evidentiary privilege against disclosure, is an issue that has never been resolved by this Court. There is no reason why it should be. The fact that a given question has never been resolved by the U.S. Supreme Court has never been a recognized basis for granting certiorari. Nor does the point that the issue might

arise once again in another libel suit, require resolution of the purported constitutionally conferred privilege here asserted. In the first place, there is no real conflict between the various state and federal cases on this issue, nor is there any likelihood that one will arise in the future.

The only real question raised by the Petitioners turns on the particular facts of this case alone, and is of interest only to the parties to it. In essence, Petitioners ask this Court to make a third review, to see if it can find what two previous courts have utterly been unable to find. This Court has held such fact-canvassing is not a task to be served by the grant of certiorari: "We do not grant certiorari review records and discuss specific facts", *United States vs. Johnson*, 221 U.S. 488, 55 L.Ed. 823, 31 S.Ct. 627, (1925). Moreover, the rulings of inferior courts are uniformly treated with and accorded great weight. In the present case, Petitioners seek the resolution of issues which do not arise from the facts of this case. Certiorari, therefore, should be denied.

Respectfully submitted,

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